

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 02 December 2005**

**BALCA Case No.: 2004-INA-00051**  
**ETA Case No.: P2001-CA-09511388**

*In the Matter of:*

**FLEXY FOAM,**  
*Employer,*

*on behalf of*

**MIGUEL RIVERA,**  
*Alien.*

Appearance: Maria Cardenas, *Pro Se*  
Chino, California  
*For the Employer*

Certifying Officer: Martin Rios  
San Francisco, California

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM:** This case arises from an application for labor certification<sup>1</sup> filed by a foam fabricator business for the position of Day Shift Production Manager. (AF 147-148). The following decision is based on the record upon which the Certifying Officer (“CO”) denied

---

<sup>1</sup> Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

certification and Employer's request for review, as contained in the Appeal File ("AF") and written arguments of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On December 20, 2000, Employer, Flexy Foam, filed an application for alien labor certification on behalf of the Alien, Miguel Rivera, to fill the position of Day Shift Production Manager. (AF 147). The job to be performed was described as follows:

Directs and coordinates, through subordinate supervisory personnel. Utilizing knowledge of production methods and procedures, plans and directs production activities of 15 employees, establishes production priorities for products in keeping with effective cost factors. Controls activities to obtain optimum production and utilization of human resources, machines and equipment. Develops and implements operating methods and procedures designed to eliminate operating problems schedules and priorities as results of equipment failure or operating problems.

(AF 196). Minimum requirements for the position were listed as three years' experience in the job offered.

The record reflects that Employer received six applicant referrals in response to its recruitment efforts; five were rejected for failure to show up to their scheduled interview and the sixth was rejected for "no experience with the procedures involved with the fabrication of foam". (AF 152).

The Certifying Officer issued a Notice of Findings ("NOF") on February 21, 2003, providing Employer an opportunity to document that its business operates on a 24-hour basis and that it has sufficient income to pay the wage offered. Employer was also instructed to document the lawful rejection of U.S. applicant Monell. (AF 142-145).

In Rebuttal, Employer explained that the company operated on a 24-hour basis and that it had three unfilled production manager positions, but failed to provide supporting documentation as requested. As a result, the CO issued a supplemental NOF on June 6, 2003. Employer was then instructed to document that the Alien met the job requirements at the time of hire and to further document lawful rejection of the U.S. worker applicant. Specifically, Employer was instructed to show how the fabrication of foam products differs and/or is unique from any other

product manufactured and/or fabricated by employers in the area of intended employment and to document that an experienced production superintendent/manager with at least three years of experience in supervisory and managerial positions could not perform the duties described in the job offered. Citing *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), the CO instructed Employer to submit convincing documentation to substantiate any assertions made. (AF133-140, 129-132).

In its second Rebuttal, Employer included documentation showing that its business operates on a 24-hour basis and that it has sufficient business income to pay the offered wage. Employer additionally submitted a letter from the Alien's former employer verifying his qualifications for the job. With respect to the unlawful rejection issue, Employer reiterated that without knowledge in the manufacturing process of its specific product, the superintendent/manager would be unable to successfully perform the duties of the job. (AF 11-128).

The CO issued a Final Determination denying labor certification on August 22, 2003 based upon Employer's failure to document the lawful rejection of U.S. applicant Monell. (AF 8-9). In denying certification, the CO found Employer's rebuttal to be unresponsive, noting that Employer had failed to submit any documentation to substantiate its assertion that the lack of experience in foam products would prevent a superintendent/manager with three years experience from successfully performing the duties of the job.

Employer filed a Request for Reconsideration by letter dated September 28, 2003, which was denied on October 3, 2003. (AF 1-7). The matter was referred to this Office and docketed on January 21, 2004.

## **DISCUSSION**

The Code of Federal Regulations at 20 C.F.R. § 656.2 1(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful, job-related reasons. The regulations at 20 C.F.R. § 656.24(b)(2)(ii), further state in part, that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a

combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. A U.S. worker cannot be considered unqualified for the job offer unless he/she fails to meet one or more of the requirements set forth by the employer on the ETA 750 Part A. 20 C.F.R. § 656.21(b)(5).

Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Although a written assertion constitutes documentation that must be considered under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

In the instant case, Employer, whose business is foam fabrication, seeks to hire a day shift Production Manager with three years' experience in the job offered. Employer rejected applicant Monell, whose resume reflects he has over 20 years of management experience, because he has "no experience in foam." As a result, the CO requested that Employer document how the fabrication of foam products differs and/or is unique from any other product manufactured and/or fabricated by employers in the area of intended employment and to document that an experienced production superintendent/manager with at least three years of experience in supervisory and managerial positions could not perform the duties described in the job offered. Employer was also specifically instructed to submit convincing documentation to substantiate any assertions made. (AF133-140, 129-132).

In response, Employer made a general statement to the effect that its foam products "are used in shipping a wide variety of products" and that "without knowledge in the manufacturing process of our product the superintendent/manager can not successfully carryout their duties as well as oversee the performance and production of each employee." Employer provided no information regarding the uniqueness of its product or any documentation as to why someone with the extensive experience of applicant Monell could not readily adapt his skills to perform Employer's job duties as described. On this basis, we conclude that labor certification was properly denied.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary of the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.